Lee Chin Kok v Jasmin Arunthuthu Allegakoen & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-349 OF 1994

EUSOFF CHIN CHIEF JUSTICE, ABDUL MALEK AHMAD FCJ AND DENIS ONG JCA

11 AUGUST 2000

Contract *— Formation — Contract for sale of property — 'Without prejudice and subject to contract' in correspondence from estate agent — Token sum paid as sign of good faith — Whether concluded contract between parties*

The respondents had three properties, which they put up for sale through an estate agent. The estate agent wrote a letter marked 'Without prejudice and subject to contract' to the appellant confirming the appellant's interest in purchasing the property at RM215,000. The letter contained the following terms and conditions: (i) the appellants were to pay the owner a token sum of RM3,000 as a sign of good faith. This sum was non-refundable if the local authority rejects the layout and building plans; and (ii) if the plans were approved by the local authority, the appellant were to pay 10% of the agreed sale price less the RM3,000 and the balance sum to be settled within three months thereafter. However, the respondent subsequently wrote a letter to the estate agent changing the conditions as stated in the agent's earlier letter to the appellant. The properties were subsequently sold to a competing purchaser. The appellant's claim against the respondent was dismissed by the High Court. The appellant appealed.

Held, dismissing the appeal:

On an analytical assessment of the authorities, it was the court's finding that each case must really depend on its own facts. Here, the respondents were at first only agreeable to the appellant submitting the layout and building plans to the local authority for approval and paying the RM3,000 to the respondents as a token sum. If the plans were not approved, the RM3,000 would be forfeited. Only if the plans were approved would the appellant have to pay 10% of the agreed price of RM215,000. The balance was to be paid within three months of the signing of the sales and purchase agreement subject to vacant possession being obtained and the properties being free of all encumbrances. All the relevant letters had the heading 'Without prejudice and subject to contract'. Apart from the payment RM3,000, nothing else had really taken place when the respondents changed the conditions by their letter to the estate agent. It cannot, therefore, be regarded as an open contract and the words 'without prejudice and subject to contract' must mean what it says. Having dutifully deliberated on the matter, the court was of the view that there was no concluded contract between the parties on the facts of this appeal and

the High Court was correct in dismissing the appellant's claim (see p 492E–H). A

[Bahasa Malaysia summary

Responden-responden mempunyai tiga hartanah yang ditawarkan untuk dijual melalui ejen hartanah. Ejen hartanah telah menulis surat dengan notaan 'Tanpa prejudis dan tertakluk kepada kontrak' kepada perayu mengesahkan kepentingan perayu di dalam pembelian hartanah tersebut pada RM215,000. Surat tersebut mengandungi terma-terma dan syarat-syarat berikut: (i) perayu-perayu akan membayar suatu jumlah sebanyak RM3,000 sebagai tanda keikhlasan. Jumlah ini tidak boleh dipulangkan jika pihak berkuasa tempatan menolak pelan-pelan dan susun atur bangunan; dan (ii) jika pelan-pelan diluluskan oleh pihak berkuasa awam, perayu akan membayar 10% harga jualan yang dipersetujui dengan menolak RM3,000 daripadanya dan jumlah baki akan diselesaikan dalam masa tiga bulan selepas itu. Namun, responden kemudian menulis suatu surat kepada ejen hartanah mengubah syarat-syarat seperti yang dinyatakan di dalam surat ejen yang terdahulu. Hartanah-hartanah tersebut kemudiannya dijual kepada pembeli yang bertentangan. Tuntutan perayu terhadap responden telah ditolak oleh Mahkamah Tinggi. Perayu telah merayu. B C D E

Diputuskan, menolak rayuan tersebut:

Atas penilaian analitis nas-nas, adalah penemuan mahkamah bahawa setiap kes mestilah bergantung kepada fakta-faktanya sendiri. Di sini, responden pada mulanya hanya bersetuju kepada perayu mengemukakan pelan dan susun atur bangunan kepada pihak berkuasa tempatan untuk kelulusan dan membayar RM3,000 kepada responden-responden sebagai jumlah sagu hati. Jika pelan-pelan tidak diluluskan, RM3,000 akan dirampas. Hanya jikalau pelan-pelan tersebut diluluskan perayu akan membayar 10% sebagai harga yang dipersetujui pada RM215,000. Baki akan dibayar dalam masa tiga bulan dari tarikh menandatangani perjanjian jual-beli tertakluk kepada milikan kosong diperolehi dan hartanah adalah bebas daripada sebarang tanggungan. Semua surat yang relevan mempunyai notaan 'Tanpa prejudis dan tertakluk kepada kontrak'. Selain daripada pembayaran RM3,000, tiada apa-apa yang lain telah berlaku apabila responden-responden mengubah syarat-syarat melalui surat mereka kepada ejen hartanah tersebut. Ia tidak boleh dianggap sebagai kontrak terbuka dan perkataan-perkataan 'tanpa prejudis dan tertakluk kepad kontrak' mestilah bermaksud begitu. Selepas mempertimbangkan dengan teliti perkara tersebut, mahkamah berpendapat bahawa tiada kontrak yang telah disimpulkan antara pihak-pihak atas fakta-fakta rayuan ini dan Mahkamah Tinggi adalah betul di dalam menolak tuntutan perayu (lihat ms 492E–H).] F G H I

A **Notes**

For cases on formation of contract generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2152–2212.

B **Cases referred to**

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327 (refd)

Crossley v Maycock (1874) 43 LJ Ch 379; LR 18 Eq 180 (refd)

Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108 (refd)

C *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39 (refd)

Appeal from: Civil Suit No 22–250 OF 1991 (High Court, Ipoh)

A Truthaya Raj (*Raj Selva & Co*) for the appellant.

D **Abdul Malek Ahmad FCJ** (delivering judgment of the court): The relevant notice of appeal was filed in the then Supreme Court on 3 June 1994, three weeks before the establishment of the Court of Appeal and the renaming of the Supreme Court to the Federal Court. According to learned counsel for the appellant, the respondents have not been served when the matter was called up for hearing before us on 15 May 2000. On our earlier E instructions, learned counsel for the appellant had placed the relevant advertisements in the West Australian papers, as the respondents reside in Perth, and in *The Star*, a local daily, as to the hearing date of the appeal. The appellant had duly sworn an affidavit as regards the advertisements on 25 April 2000.

F A check of the Registry records, however, indicate that the respondents' solicitors, both the past solicitors in Ipoh and the present solicitors in Perth, have been duly served with the notices of hearing all along. The previous solicitors were duly discharged by order of court dated 24 March 1998. In view of the long delay since the appeal was filed, we decided to proceed with the hearing despite the respondents and their counsel not G being present.

The decision appealed against was made in the High Court on 23 May 1994 but there are no grounds of judgment to assist us as the learned trial judge had retired on medical grounds that same year. With the respondents and their counsel absent, we were left only with the arguments of learned counsel for the appellant.

H The facts, according to learned counsel, were that the respondents had three properties in Taiping, namely Lot No 2917, 2918 and 2919, which they put up for sale through PW2 who was working in CH Williams Talhar and Wong Sdn Bhd, a well known estate agent in this country. This is evident from the letter written by the estate agent to the appellant marked I 'Without Prejudice and Subject To Contract' dated 13 June 1991.

It is relevant to reproduce the said letter in full to get the proper impact of its contents:

Without Prejudice & Subject to Contract

13 June 1991

Mr Lee Chin Kok,

400, Jalan Kampung Maharaja Lela,
34000 Taiping,
Perak Darul Ridzuan

Dear Sir,

Re: For Sale
Lots 2917, 2918 & 2919,
Town of Taiping, District of Larut, Perak

Further to the meeting between your goodself and our Mr Robert Tan of even date, it was confirmed that you are still interested to purchase the above property at RM215,000 (Ringgit Malaysia Two Hundred and Fifteen Thousand only) with vacant possession and free from all encumbrances.

As discussed, we are to write to the land owner on this and the following terms and conditions:

1 That the landowner allows you to put up layout and building plans for the erection of a showroom on the above-mentioned property.

2 That you are prepared (sic) to pay the owner a token sum of RM3,000 (Ringgit Malaysia Three Thousand only) as a sign of good faith. This sum is non-refundable if the local authority rejects the said plans for whatever reasons.

3 That, if the said land and building plans are approved by the local authority, you will proceed with the above sale immediately and that your method of payment will be as follows:

(a) 10% of the agreed sale price less the RM3,000 (Ringgit Malaysia Three Thousand only) (that is the token sum); and

(b) the balance sum amounting to 90% of the sale price to be settled within three months thereafter subject to obtaining vacant possession and free from all encumbrances.

As instructed by your goodself, we have already written to the owner on the above and also informed her that your lawyer will be preparing the sales and purchase agreement if she is agreeable to the terms and conditions as set out.

We will inform you immediately once we have received a reply from her.

Thank you.

Yours faithfully,
CH Williams, Talhar & Wong Sdn Bhd

A similar letter was sent by the estate agent to the third respondent on the same date. The contents of that letter is supported by another letter dated 1 July 1991 from the third respondent to PW2 where another condition had been added. The appellant had then paid the RM3,000 which PW2 acknowledged by receipt dated 4 July 1991.

However, PW2 subsequently received a letter dated 15 July 1991 from the respondents' solicitors in Perth, Australia which read as follows:

15 July 1991

Mr R Tan
CH Williams, Talhar & Wong Sdn Bhd
19B & C Jalan Sultan Idris Shah
PO Box 562,
30760 Ipoh, Malaysia

Dear Mr Tan

Lots 2917,2918 & 2919
Town of Taiping,
District of Larut & Matang, Perak

I refer to our telephone conversation earlier today and to your recent discussions with my sister-in-law, Mrs J Maxwell-Black.

As I indicated on the telephone, Mrs Maxwell-Black and the other owners of the above property (who I shall refer to in this letter collectively as 'the owners') have authorized me to respond formally to the proposal set out in your letter to Mrs Maxwell-Black of 13 June 1991.

As you are aware, Mrs Maxwell-Black has recently received two competing offers for the property and for this reason the owners are not prepared to accept Mr Lee's current proposal. However, in view of Mr Lee's continuing interest in the property, and having regard to the time and effort which has already been put into the negotiations with Mr Lee, the owners are prepared, as a matter of courtesy to Mr Lee, to extend to him an opportunity to match the offers just referred to.

The terms of these offers (which do not differ materially as between themselves) are as follows:

(1) The purchase price is RM265,000 (*not* RM250,000 as I indicated to you on the telephone), on the basis that the property will be transferred to the purchaser at settlement with vacant possession and free from all encumbrances.

(2) A deposit of 10% of the purchase price (viz RM26,500) will be paid upon execution of the sales and purchase agreement, which shall take place not later than 14 days after acceptance of this offer.

(3) The balance of the purchase price (viz RM238,500) will be paid in full by bank cheque at settlement, which shall take place one month after execution of the sales and purchase agreement.

(4) The purchase of the property will otherwise not be subject to any special terms or conditions. In particular, and for the avoidance of doubt, the purchase *will not* be subject to any condition requiring Mr Lee to obtain local authority approval of his proposed building plans or any other approvals of a like nature.

The owners are prepared to keep this offer open until 5.00 pm (Perth, Western Australia time) on Monday, 22 July 1991, at which time it will automatically lapse if not accepted in writing before then. Thereafter, the owners will be free to deal with the property as they see fit, and in particular to accept either of the competing offers referred to above.

This offer supersedes all previous offers, proposals and other discussions between you, Mr Lee and Mrs Maxwell-Black in respect of the property, which are hereby withdrawn and cancelled.

I emphasize that, in view of the competing offers received for the property, it is imperative that if Mr Lee wishes to proceed with the purchase he should respond to this proposal without delay as it will not be possible to extend the time limit specified above.

For the same reason, the owners are not able to entertain any variations to the above proposal or counter-offers from Mr Lee.

I look forward to hearing from you.

Yours sincerely

Sgd
NC FEARIS

Learned counsel for the appellant argued that the respondents could not contract out of their earlier agreement with the appellant as they had accepted his deposit. So when they sold the three properties to the subsequent purchaser, the appellant had lodged a caveat on the said properties.

This was, however, removed on the same date of the High Court decision which has led to this appeal. Learned counsel for the appellant complained that there had been a long delay in the delivery of the decision as the case was adjourned for decision on 28 September 1992 but the decision was delivered only on 23 May 1994.

Learned counsel referred to *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 where this court ruled that the phrase 'subject to the sales and purchase agreement' relied on by the vendor did not point to an intention that no contract was to come into existence until a formal sales and purchase agreement had been prepared and executed. Rather, it was, they continued, that when read in the context of the correspondence and the objective aim of the transaction, indicative of an intention to merely formalize the agreement already concluded between the parties.

When questioned by the court, learned counsel answered that the respondents never signed the building approval plans. There was also no sales and purchase agreement entered into and, by letter dated 16 July 1991, the RM3,000 deposit had been refunded to the appellant.

Learned counsel referred to another passage in the *Charles Grenier*'s case at p 335 which states:

> Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.
>
> Unless the approach we have stated is adopted, a party to a contract who — after having concluded his bargain — entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.

A The law leans in favour of upholding bargains and not in striking them down willy-nilly, and its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494 where he said:

> 'Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business B far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have C used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.'

D This principle applies not only to documents drafted by laymen, but also to those prepared by lawyers (see *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99).

The *Charles Grenier*'s case need to be distinguished on the facts. There, the appellant vendor was the registered proprietor of two shophouses and had engaged the services of the estate agents to search for a purchaser for the said property at the price of RM450,000. The estate agents found the E respondent as purchaser. In November 1989, the vendor's solicitors accepted the purchaser's offer of RM450,000 on behalf of the vendor on condition that the purchaser pay a 10% deposit by the 28th of that month and the balance purchase price within three months from the execution of the sales and purchase agreement.

F On the appointed date, the estate agents sent the 10% deposit in the form of a cheque to the vendor's solicitors, together with a letter confirming the purchaser's offer to purchase the said property 'subject to the sales and purchase agreement'. However, a third party had, on the following day, namely 29 November 1989, caused a writ to be issued against the estate agents and the vendor asking for specific performance of an agreement G made either on 24 or 26 November 1989 for the sale of the said property to them.

The third party had also obtained an ex parte injunction restraining the vendor from entering into any agreement for the sale of the property to any other person. The vendor took the stand that the agreement it had with the purchaser had been rendered impossible of performance and informed the H purchaser accordingly.

On 29 October 1994, about five years later, the vendor took out a summons claiming a declaration to the effect that if there was an agreement between it and the purchaser, such agreement had been frustrated by the grant of the injunction. That application was dismissed in the High Court.

I Consequently, the vendor appealed, contending that the agreement to sell was subject to contract, and that there was no contract concluded between it and the purchaser. It was argued that the phrase 'subject to the

sales and purchase agreement' appearing in the letter, where the purchaser's offer was accepted by the vendor, showed that the parties were still negotiating, and that there were many items which they had not agreed upon.

The issues before this court were whether there was a valid and enforceable agreement between the vendor and the purchaser and if the answer was in the affirmative, whether that agreement had been frustrated by the grant of the injunction in question.

In the ensuing appeal, this court examined the contents of the two letters, the first where the vendor accepted the purchaser's offer of RM450,000 on condition that the purchaser pay the 10% deposit by 28 November 1989 and the balance within three months from the execution of the sales and purchase agreement, and the second, enclosing the 10% cheque and confirming the purchaser's offer to purchase the property 'subject to the sales and purchase agreement'. This court was unable to find in that case that the parties intended that there should be no concluded contract until a formal sales and purchase agreement had been executed.

They further said (at p 336):

> They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will — acting out of necessity (see *Liverpool City Council v Irwin* [1977] AC 239) — imply terms into the contract for sale in order to make it work. See *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land, a covenant on the part of the vendor to do all things necessary to give effect to the agreement.
>
> Dr Geoffrey Cheshire in the 10th edition of his work, *The Modern Law of Real Property*, describes an open contract as follows:
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> > 'If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law.'
>
> The phrase 'subject to the sales and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sales and purchase agreement had been prepared and executed. Rather, it is, when read in the context of the correspondence and the objective aim of the transaction — and this is how we read them — indicative of an intention to merely formalize the agreement already concluded between the parties.

In the instant appeal, there was no 10% deposit. The only payment was the RM3,000 which was only a token sum as a sign of good faith to signify the purchaser's agreement to buy the relevant properties. This sum was not refundable if the local authority rejected the layout and building plans submitted by the purchaser. Only if the said plans are approved will the sales

A and purchase agreement be proceeded with. It cannot, therefore, unlike the *Charles Grenier*'s case, be regarded as an open contract and the words 'without prejudice and subject to contract' must, therefore, mean what it says.

In *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39, the B appellants, who were the vendors, wrote to the estate agent on 1 March 1976 as follows (at p 39):

> I confirm, subject to contract, that the lowest price I am willing to sell the said property is $5.40 per square foot in Singapore currency, the sale and purchase to be completed latest by 24 March 1976. Ten per cent deposit to be paid within the course of the next few days if your buyer Mr Yeo Ah Tee agrees to C the price and the terms.

There were further negotiations and eventually the estate agent wrote on 3 March 1976 to confirm the sale:

> We refer to our telephone conversation this afternoon in which you have kindly accepted our client's (Mr Yeo Ah Tee) further offer regarding the D above, with vacant possession at a price of $5.20 per square foot for $454,391.60 cents Ringgit, Four hundred and fifty four thousand three hundred and ninety one dollars and cents sixty only. The sale is to include all buildings, plant and machinery and all ancillary facilities etc. We have received further instructions to inform you that our client has appointed Messrs Ting Poi Tak & Co of 30 Jalan Laksamana as his solicitors to deal with E all legal matters pertaining to the above sale. Messrs Ting Poi Tek & Co will communicate direct with you regarding the sale.

The appellants refused to complete the agreement and the respondent applied for specific performance. In his statement of claim, the respondent averred that there was a concluded contract and this was specifically F admitted by the appellants in their statement of defence. The appellants in their defence stated that the sale was subject to contract and that they had informed the respondent's solicitors that they did not wish to sell the property. The trial judge ordered that the agreement of sale be specifically performed and carried into execution. The appellant appealed.

It was held by this court (Salleh Abas CJ (Malaya), Abdul Hamid and G Seah FCJJ) that on the evidence and the exhibits in that case, it was the intention of the parties to come to a definite and complete agreement on the subject of the sale and the mere fact that a written agreement had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement. The court also held that a legally binding and enforceable agreement was concluded on 3 March 1976 and H the learned judge had not erred either in law or fact in arriving at the finding that he did. It must be stressed here again, the facts there are distinguishable from the facts in the present appeal.

In *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108, the respondent claimed to have entered into a binding agreement with the I appellant for the sale of certain lands relying on a letter addressed from the appellant, as vendor, to the respondent, as purchaser. The terms of the said document contained a proviso, namely, 'that the sales and purchase

agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989', otherwise the deposit was to be refunded to the respondent. A sales and purchase agreement was subsequently prepared and signed by the respondent only, and sent to the appellant's solicitors. The agreement included two new conditions, to which the appellant did not agree, and it therefore refunded the respondent's desposit.

Prior to the hearing of the action in the High Court, the respondent obtained an order for:

(a) the redemption sum of the land to be paid directly to Malayan United Finance Bhd, the chargee; and

(b) the titles of the land to be retained in court after their release by the chargee.

The respondent did in fact pay the redemption sum to the chargee pursuant to the order. The appellant contended that there was no binding contract and that it was still then negotiating with the respondent. The trial judge found that there was a binding and concluded agreement and ordered specific performance. The appellant appealed.

The Supreme Court (Peh Swee Chin SCJ) held in the headnotes as follows at pp 108–109:

(a) There was no contract at all because the said document was dependent on the signing of a formal contract to be further negotiated and approved by both parties. The proviso in the said document was very similar to the phrase or formula of 'subject to contract'. There need not be the very words of the said formula in order to have the usual effect arising from the use of such formula.

(b) The words 'usual terms and conditions' failed to reveal certainty and were too ambiguous. What would be the usual terms and conditions remained largely a matter of conjecture, thus the words would create uncertainty unless a contract containing these agreed 'usual terms and conditions' had been signed by the parties.

(c) It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract and it requires cogent evidence to displace this strong presumption. On the facts of this case, there was cogent evidence to show that negotiations were still ongoing between the parties, including:

  (i) the provision of the return of the deposit on the failure of the parties signing the contract by 18 March 1989;

  (ii) the agreement which was signed by the plaintiff only, containing two more conditions;

  (iii) there could have been a further amended draft of the ultimate agreement to take account of withdrawal of the compulsory acquisition over part of the land; and

  (iv) the correspondence after the date of the said document.

(d) Evidence of surrounding circumstances, background and negotiations between parties is admissible and relevant to show that there was no

A contract or concluded and binding agreement at all, for ss 91 and 92 of the Evidence Act 1950 merely strike at evidence to contradict, vary, etc, the terms of an established contract, for in that event, such evidence would be unacceptable. Correspondence that passed after the date of the said document was relevant also, for in finding whether there was any contract at all, the court must look at the correspondence as a whole.

B (e) The sum of RM2.48m, paid by the respondent to the chargee, was to be refunded by the appellant to the respondent, with interest at 6.5% pa thereon from the date of the respondent's payment of the same to the date of repayment to the respondent, and costs of the appeal and in the court below were awarded to the appellant.

C In *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, the respondent had entered into negotiations to construct low-cost houses and shophouses for the workers of the appellant. The appellant wrote a letter to the respondent on 19 September 1984 accepting their proposals in respect of the project, subject to certain terms and conditions, one of which was that the terms and conditions in the letter D were to be constituted in an agreement between the respondent and the appellant and that appropriate indemnity clauses in favour of the appellant be incorporated in the agreement.

In reliance upon the letter, the respondent proceeded to perform some of their obligations stated therein, although no formal agreement in writing had been executed. Subsequently, the appellant instructed the respondent E to cease all work, stating their intention to discontinue negotiations and that any work done had been entirely at the respondent's risk. The appellant contended that the work had been done before the coming into being of any contract and that the letter was part of ongoing negotiations for a future agreement. On the other hand, the respondent submitted that all essential F terms had been agreed and all that remained to be done was to put the terms into the form of a contract. The trial judge found that there was a contract and allowed the respondent's claim for breach. The appellant appealed. The primary issue was whether there was a concluded contract between the appellant as employer and the respondent as contractor.

It was held by the Supreme Court (Abdul Hamid Omar LP, Edgar G Joseph Jr and Mohamed Dzaiddin SCJJ), in allowing the appeal, that the existence of an agreement depends upon the intention of the parties, who must be ad idem, which may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract. The court will generally apply an objective or H reasonable man test. Merely because the parties contemplate the preparation of a formal contract, they added, that would not prevent a binding contract from coming into existence before the formal contract is signed. However, when an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it will generally be construed to mean that the parties are still negotiating and do I not intend to be bound until a formal contract is exchanged.

Having regard to the fact that the letter did not contain details such as what 'the appropriate indemnity clauses' were, together with its vital

qualifying clause 'subject to the following terms and conditions', they also held that the case fell within the principle in *Crossley v Maycock* (1874) 43 LJ Ch 379; LR 18 Eq 180 that if an agreement is made subject to certain conditions, then until those conditions are accepted, there is no enforceable final agreement. On its true construction, they were of the opinion that the letter did not constitute a contract binding in law but was only a record of terms which were agreed as a basis for the negotiations of a contract. It was, they said, a letter of intent, an expression in writing of a party's present intention to enter into a contract at a future date. Since the plaintiff had commenced the preliminary works, with the knowledge but not necessarily the consent of the defendant, the liability of the defendant would be on a quantum meruit basis not exceeding RM300,000.

It was held obiter that the proposition in *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* must be read keeping in mind the vital qualifying clause there that the so-called deposit fell to be refunded if no agreement was signed. It does not detract from the principles that:

(a) an informal contract without any express details may be binding;

(b) a bargain with essential terms, though a formal document is to be drawn up with further terms, is still a bargain; and

(c) where there is a definite and complete agreement, the reservation in respect of a formal document only means that it should be put into proper shape and in legal phraseology with any subsidiary terms necessary for insertion in a formal document.

On an analytical assessment of the abovementioned authorities, it was our finding that each case must really depend on its own facts. Here, the respondents were at first only agreeable to the appellant submitting the layout and building plans to the local authority for approval and paying the RM3,000 to the respondents as a token sum as a sign of good faith. If the plans were not approved, the RM3,000 would be forfeited.

Only if the plans were approved would the appellant have to pay 10% of the agreed price of RM215,000. The balance was to be paid within three months of the signing of the sales and purchase agreement subject to vacant possession being obtained and the properties being free of all encumbrances. All the relevant letters had the heading 'Without Prejudice and Subject To Contract'. Apart from the payment of RM3,000, nothing else has really taken place when the respondents changed the conditions by their letter to the estate agent dated 15 July 1991.

Having dutifully deliberated on the matter, we are of the unanimous view that there was no concluded contract between the parties on the facts of this appeal and the High Court was correct in dismissing the appellant's claim. The appeal is dismissed. In these circumstances, there will be no order as to costs and the deposit is refunded.

Appeal dismissed.

Reported by Jafisah Jaafar